Supreme Court, U.S.
FILED
MAY 12 1989

No. 88-1445

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

NATIONAL ASSOCIATION OF CASUALTY AND SURETY AGENTS, *et al.*,
Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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Respondents defend the court of appeals' decision by pointing to excerpts from that opinion correctly reciting the two-part test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as if merely by reciting the appropriate principles the court of appeals fulfilled its duties under *Chevron*. *See* Opposition of Federal Respondent at 4, 6-7; Opposition of Trustcorp, Inc. at 8 & n.5; Opposition of MNC Financial, Inc. at 2-3.[1] However, the D.C. Cir-

[1] Respondents make the same mistake in their defense of the three court of appeals *Chevron* decisions discussed in the Petition at pages 12-13. *See* Opposition of Federal Respondent at 8-9; Opposition of Trustcorp, Inc. at 14-15; Opposition of MNC Finan-

cuit's assertion that it was "moving to the second step of the *Chevron* inquiry," 856 F.2d at 289, Pet. at 16a, fails to demonstrate that the D.C. Circuit gave due deference to the first step. None of the respondents addresses the central argument raised in the Petition—that by declining to "reject the Board's construction based on what might be thought to be a fortuitous choice of an article," 856 F.2d at 288, Pet. at 12a, the court effectively applied a presumption that an agency's interpretation conflicting with plain statutory language will be given deference unless there is some indication that Congress' choice of language was other than "fortuitous." But there is no requirement that Congress, when it enacts statutory language, add an express proviso saying, "And we really mean it." The D.C. Circuit's approach, based on the belief that Congress may not mean what it says, emasculates the first step of the *Chevron* formulation by allowing agencies to enforce statutory interpretations that ignore congressional intent as determined through traditional statutory construction principles.

The Acting Solicitor General suggests that the Court should not review this case in part because certiorari has recently been granted in *Michigan Citizens for an Independent Press v. Thornburgh*, No. 88-1640, in which the Court has been asked to clarify its *Chevron* decision. Opposition of Federal Respondent at 10 n.3. However, this Court's decision to review a case raising issues similar to those raised in this case is not a reason to deny this Petition, but is rather yet another indication that this is an area of law in need of clarification by this Court. At most, the pending review of the *Michigan Citizens* case is cause for deferring decision on this Peti-

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cial, Inc. at 8-10. What is important is not whether courts are accurately quoting from this Court's precedents but whether they are in fact adhering to the principles they have recited.

tion until this Court has resolved the *Chevron* issues in that case.[2]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[2] In *Michigan Citizens*, as in this case, it is alleged by the petitioners that the D.C. Circuit, through Judge Silberman, misapplied the principles of *Chevron* and improperly deferred to an agency's interpretation of a statute because the court failed to adhere to traditional canons of statutory construction. The *Michigan Citizens* petitioners argue that the D.C. Circuit held that "in view of this Court's decision in *Chevron*, the Attorney General was not required to apply the rule of statutory construction that exemptions from the antitrust laws are to be narrowly construed," No. 88-1640, Petition for a Writ of Certiorari at 11, and that such a decision "would . . . expand the *Chevron* rule of deference to the point where agencies would be free to ignore rules of construction that have long guided courts, Congress, and administrative agencies," *id.* at 13. The related issue in this case is whether the D.C. Circuit erred in deferring to an agency's interpretation when Congress' contrary intent is plainly discernible through application of traditional canons of statutory construction such as the doctrine of *expressio unius est exclusio alterius*, *see* Pet. at 8-9 n.4, 10, 12a-13a, the rule that a statute should be interpreted so as to give meaning to each of its provisions, *see* Pet. at 9 n.4, 10, and the fundamental canon that the "plain meaning" of a statute controls in the absence of a clearly expressed legislative intention to the contrary, *see* Pet. at 7-9.